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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 849. 519

A. J. HENTIG, APPELLANT,

vs.

H. J. PAGE, RECEIVER ETC., AND B. F. SIMPSON, U. S. MARSHAL FOR THE DISTRICT OF KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED SEPTEMBER 25, 1879.

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No. 849.

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1 In the circuit court of the United States for the district of Kansas.

MARY A. SMITH, ADMINISTRATRIX DE BONIS non, with the will annexed, of Julius C. Wright, deceased, complainant,
vs.
DANIEL M. ADAMS, OLIVE A. ADAMS, HIS WIFE, Frederick G. Hentig, Alfred H. Hentig, Squire Bond, George Hentig, Isaac Rosser, John Freeman, The Citizen' Bank of Topeka, Kansas, Herman Markson and Jonathan Myers, assignees of The King Wrought Iron Bridge Manufactory and Iron Works of Iola, Kansas, The Second National Bank of Leavenworth, Kansas, H. B. Cullum, receiver of the First National Bank of Topeka, Kansas, Albert G. Edwards, Leonard Mathews, and Edward Whitaker, partners as Edwards, Mathews & Co., S. Brunswick and H. Brunswick, partners as S. and H. Brunswick, The Valley National Bank of St. Louis, Mo., The Clerks' Savings Bank, The Life Association of America, The Henbacker Forge and Rolling Mills, The Mastin Bank of Kansas City, Mo., Moulton G. Farnham, and Mathew K. Smith, partners as Smith & Farnham, J. S. Scott, Zenas King, Oscar H. Butterfied, and Andrew J. Butterfield, defendants. } 2055.

2 Be it remembered that on this day, to wit, Wednesday, June 4, 1879, at the June term, 1879, of said court, in the record of the proceedings thereof in said entitled suit, is the following entry, to wit:

Journal entry.

In the circuit court of the United States for the district of Kansas. In equity.

MARY A. SMITH, ADMINISTRATRIX DE BONIS non, with the will annexed, of Julius C. Wright, deceased, complainant,
vs.
DANIEL M. ADAMS AND OTHERS, DEFENDANTS.

Order appointing receiver.

Hiram P. Dillon, esq., one of the masters of this court, having been heretofore directed to inquire and report to this court whether the premises in controversy herein are adequate security for the amount found due the complainant herein, and whether the said Daniel M. Adams is insolvent, and also to recommend to the court some suitable person to be appointed receiver of said premises until sale and confirmation thereof under the decree rendered herein; and the said master having filed his report concerning said matters, setting forth as the results of his inquiries that said premises are inadequate security for the sums found due said complainant, and that the said Daniel M. Adams is insolvent,

and recom'ending to the court H. J. Page as a suitable person to be appointed receiver of said premises, and further recom'ending that
3 said receiver be required to give bond only in a nominal sum:

It is now by the court, on motion of G. C. Clemens, of counsel for said complainant, ordered that the said H. J. Page be, and he is hereby, appointed receiver to receive the rents and profits of the premises and appurtenances described in the bill of complaint, and the decree heretofore rendered herein, and that the tenants of said premises attorn and pay their rents in arrears and growing rents to the said receiver.

It is further ordered that said receiver lease said premises either to the present occupants or others, for such rental and in such form and for such term or period as may be approved by Hiram P. Dillon, esq., one of the masters of this court; and all persons in possession of said premises, whether parties to this cause, tenants under any of them, or persons who have come into possession pending these proceedings, are ordered and required to yield up possession of said premises to said receiver upon demand.

It is further ordered that said receiver may without further application or order make such repairs, procure such insurance, and make such expenditures generally for the benefit, preservation, and protection of said premises and the interest of parties as the master aforesaid shall from time to time advise, warrant, and approve, and all leases, acquittances, and policies of insurance given or taken by said receiver shall be first submitted and examined and approved by said master.

It is further ordered that said receiver give bond or recognizance in the sum of two hundred dollars, to be approved by said master for the faithful execution of his trust.

4 It is further ordered that said receiver shall continue his receivership until the further order of the court, or a judge or justice thereof, discharging him, all other matters in said report being reserved for future action.

June 3, 1879.

C. G. FOSTER, *Judge.*

(Endorsed:) No. 2055. Mary A. Smith, adm'x, &c., compl't, vs. D. M. Adams et al. Order appointing receiver and referring his further directions to H. P. Dillon, master. Filed June 4, 1879. A. S. Thomas, clerk, by J. N. Strickler, deputy G. C. Clemens, solicitor.

5 And on this day, to wit, July 10, 1879, there was filed in the clerk's office of said court a report of receiver in said-entitled suit, which said report of receiver is in the words and figures following, to wit:

Report of receiver.

In the circuit court of the United States for the district of Kansas.

MARY A. SMITH, ADM'R'X, &C., COMPL'T,
vs.
DANIEL M. ADAMS, OLIVE A. ADAMS, ET AL., DEFENDANTS.
} Report of receiver.

To the honorable the judges of said court:

By virtue of the order of this court of June 4th, 1879, appointing me receiver of the premises in controversy in this , I, on the 1st day of July, 1879, proceeded to the said described property, viz, commencing at the northeast corner of reserve numbered two (2) of the Kansas half-

breed lands; thence running west twenty-four and one-half (24½) chains; thence south to the Kansas River; thence east to the southeast corner of said reserve; thence north to the place of beginning, excepting, however, seventy-two (72) acres of the north end thereof; said tract containing one hundred and twenty-eight acres in Shawnee County, State of Kansas.

I found the property in possession of Edward or Clarence Gillan (whose right name I am not certain of), and that he has sub-rented about ten acres to one J. N. Slusher, and about 10 acres to one Frank
6 Zurick. I, on said first day of July, demanded possession of said portions, being occupied by said J. N. Slusher & Frank Zurick, of them, which they refused.

I afterwards demanded possession of said above-described property of said Gillan, which he refused. I am unable to find by what title or authority said Gillan holds possession of said property, but he informs me he has rented the premises from Mr. F. G. Hentig, for one year from the first day of last March, for the sum of two hundred dollars. Said Gillan further informs me he has paid said F. G. Hentig one hundred and fifty dollars of said rent, and that the sum of fifty dollars is still due and owing.

I further report that on said first day of July, 1879, I left a copy of the order appointing receiver in said suit for said Gillan with one Mary F. June, an adult person, who stated she was housekeeper to said Gillan.

All which is respectfully submitted.

H. J. PAGE, *Receiver.*

UNITED STATES OF AMERICA,
District of Kansas, ss:

H. J. Page, being duly sworn, says he is the receiver duly appointed by said court in said suit, and that the matters set forth in the above report are true.

H. J. PAGE.

Subscribed and sworn to before me this 10th day of July, 1879.
[SEAL.] A. S. THOMAS, *Clerk,*
By J. N. STRICKLER, *Deputy.*

(Endorsed:) No. 2055. Mary A. Smith, adm'x, &c., vs. D. M. Adams et al. Report of receiver. Filed July 10, 1879. A. S. Thomas, clerk.

7 And on this day, to wit, Thursday, July 10, 1879, the clerk of said court made an entry on the order book in said entitled suit; which said entry is in the words and figures following, to wit.

Order-book entry.

MARY A. SMITH, ADM'R'X, &C., COMPL'T,
vs. } 2055.
DANIEL M. ADAMS, ET AL., DEF'TS.

Now comes H. J. Page, receiver appointed in said suit, and files his report therein.

8 And on this day, to wit, July 10th, 1879, the clerk of said court issued a writ of assistance in said entitled suit, which said writ of assistance, with the endorsement and marshal's return thereon, is in the words and figures following, to wit:

Writ of Assistance.

In the circuit court of the United States for the district of Kansas.

MARY A. SMITH, ADMINISTRATRIX DE BONIS non, with the will annexed, of Julius C. Wright, deceased, complainant,
vs.
DANIEL M. ADAMS, OLIVE A. ADAMS, OSCAR H. Butterfield, Andrew J. Butterfield, et al., defendants.
} 2055.

UNITED STATES OF AMERICA,
District of Kansas, ss.

The United States of America, to the marshal of said district, greeting:

Whereas, on application of said complainant duly heard and granted, a certain order was made and entered in this cause on the 4th day of June, A. D. 1879, appointing H. J. Page receiver in said cause of the following described real estate in controversy herein, to wit: Commencing at the northeast corner of reserve number two (2) of the Kansas half-breed lands, thence running west twenty-four and one-half (24½) chains, thence south to the Kansas River, thence east to the
9 southeast corner of said reserve, thence north to the place of beginning, excepting, however, seventy-two (72) acres of the north end thereof, said tract containing one hundred and twenty-eight (128) acres, situated in Shawnee County, State of Kansas.

And whereas, it was part of said order that all persons in possession of said premises, whether parties to this said cause, tenants under any of them, or persons who have come into possession pending the proceedings in said cause, were thereby ordered and required to yield up possession of said premises to said receiver upon demand;

And whereas it appears by the affidavit of said H. J. Page, filed herein, that he has duly demanded possession of said premises of the persons in possession thereof and that they have upon said demand refused to yield up possession of said premises as directed and required by said order, and have refused to obey said order;

You are therefore commanded immediately upon the receipt of this writ to enter upon the said lands and tenements, and remove, eject, and expel therefrom and from every part thereof all persons in possession thereof, whether they be parties to this cause or tenants under any of said parties, or persons who have come into possession of said premises, or any part thereof, pending this cause; and you are further commanded as aforesaid to place and put said H. J. Page, receiver, as aforesaid, into the full, quiet, and peaceable possession of said premises in accordance with the said order of appointment.

And herein you are in no wise to fail.

Witness, Hon. Morrison R. Waite, Chief Justice of the Supreme
10 Court of the United States, with the seal of said Circuit Court affixed, at Topeka, in said district, this the 10th day of July, A. D. 1879.

[SEAL.] A. S. THOMAS, *Clerk.*

(Endorsed:) No. 2055. Mary A. Smith, adm'x., &c., *vs.* Daniel M. Adams et. al. Writ of assistance.

Received this writ the 10th day of July, 1879. Returned this the 14th day of August, 1879, by order of the within named receiver, H. J. Page.

B. F. Simpson, U. S. Marshal. By S. P. Wade, deputy. Filed Aug. 14, 1879. A. S. Thomas, clerk.

11 And on this day, to wit, July 12th, 1879, the clerk of said court made an entry on the order book of said court in said entitled suit, which said entry is in the words and figures following, to wit:

Order-book entry.

MARY A. SMITH, ADMINISTRATRIX, &C., COMplainant,
vs. } 2055.
DANIEL M. ADAMS, OSCAR H. BUTTERFIELD, Andrew J. Butterfield, et al., def'ts.

Let an order be issued for the comp' & receiver to show cause before me on 18th day of July, at 10 a. m., 1879, at my chambers, why the writ of assistance should not be revoked, & in the mean time let nothing further be done under the writ. Service of the order to be made at least three days before the hearing.

July 12, 1879.

C. G. FOSTER, *Judge.*

I accept service; a copy to be furnished me by Wednesday morning, July 16.

G. C. CLEMENS,
Solicitor for Complainant.

I accept service.

H. J. PAGE,
Receiver.

(Endorsed:) Filed July 12, 1879. A. S. Thomas, clerk.

12 And on this day, to wit, Friday, July 18th, 1879, the clerk of said court made an entry on the order book of said court in said entitled suit, which said entry is in the words and figures following, to wit:

Order-book entry.

In the matter of the petition of A. J. Hentig.

MARY A. SMITH, ADM'R'X, &C., COMPL'T,
vs. } 2055.
DANIEL M. ADAMS ET AL., DEFENDANTS.

Leave given to file this as substituted for original petition.

C. G. FOSTER,
Judge.

13 And on this day, to wit, July 18, 1879, there was filed in the clerk's office of said court substituted petition of A. J. Hentig in said entitled suit, which said substituted petition is in the words and figures following, to wit:

Substituted petition of A. J. Hentig.

In the circuit court of the United States for the district of Kansas.

To the Hon. C. G. Foster, one of the judges of said court:

A. J. Hentig, your petitioner herein, respectfully represents to your honor that she has title & in possession (by tenants) of the following described real estate, to wit, all that tract or parcel of land situate in the county of Shawnee & State of Kansas, & bounded & discribed as follows: Beginning $37\frac{85}{100}$ chains south of northeast corner of reserve #2, Kansas Half-breed Indian land, thence west twenty-four chains & fifty links, thence south to the Kansas River, thence east to east line of said reserve, thence north to place of beginning; 128 acres. That she purchased the same at a sale for taxes, a copy of the certificate for which is hereto attached & made a part of this petition & marked A. That she rented said land to C. E. & W. K. Gillan on the 8th day of February, A. D. 1879, & that said tenants now reside on said premises under her written lease of that date, a copy of which is hereto attached & made part of this petition, marked B.

And your petitioner further shows unto your honors that said tenants have paid to your petitioner all the rent due her under said lease, to wit, $150 in cash and their note for $50, payable to bearer, and
14 due on or before the 1st day of December, 1879, and that said note has been long since transferred by your petitioner; and your petitioner further shows to your honor that she is the owner of the house, out-house, and pump, which is her personal property, and is now situated on the land above described, & occupied by said tenants.

And your petitioner further shows to your honor that she is informed, and believes the same to be true, that the land above described is the same land in dispute in the case of Mary A. Smith, adm'x, &c., vs. Daniel M. Adams & others, now pending in the United States circuit court before your honor. That her title to said land was not derived through any of the defendants in said suit, but is a separate and distinct title, and paramount to any title or interest the said defendants, or either of them, may have in said property. That she is not or was not a party to said suit, nor was her said tenants in any manner, either as plaintiffs or defendants, and had no notice of said suit.

And your petitioner further shows to your honor that the property above described is of the value of $5,500 or more. And she has also been informed that a receiver was appointed by said court for the premises described in the bill of complaint filed in said cause, & that he has demanded possession of said premises from her said tenants & was refused. And she is also informed, and believes the same to be true, that said receiver has caused a writ of assistance to be issued by the clerk of said court to put him into the possession of her said property;
15 that said writ is now in the hands of the marshal of the United States for the district of Kansas; and that said writ commands said marshal to remove, eject, and expell therefrom all persons in possession of said property, whether parties to said action or not, and all parties holding under or through said defendants, whether they have come into possession through any of said defendants before or since the commencement of said action or instruction, if not in the same words or to that effect, and that the land described in said writ of assistance is the same land owned and in possession of your petitioner.

And your petitioner further shows to your honor that there is great and imminent danger that she will suffer irreparable damage, and be put

to great expense, and suffer heavy losses, if said marshal should carry out said instructions; that she has not had her day in court, and it is a well settled rule of law that no person shall be condem'ed in their rights of property, as well as their rights of person, without their day in court, and having an opportunity of being heard thereon.

Wherefore your petitioner prays that the said marshal may be enjoined from further proceeding in the execution of said writ; and that upon the hearing said writ may be revoked by an order of this court, and that your petitioner may have such other & further relief as to equity may seem meet. And as in duty bound will ever pray, &c.

A. J. HENTIG,
By HENTIG & SPERRY,
Her Solicitors.

16 STATE OF KANSAS,
County of Shawnee, ss:

A. J. Hentig, being by me first duly sworn, says that she has read the above and foregoing petition, & knows the contents thereof, and that the matters and things therein contained are true in fact, except such as are stated on information and belief; and as to those matters, she believes them to be true.

A. J. HENTIG.

Subscribed & sworn to before me this 16th day of July, A. D. 1879.
[SEAL.] J. H. MOSS,
Notary Public, Shawnee County, Kansas.

A.

TAX SALE CERTIFICATE.

No. 993] [$64.97

I, Chester Thomas, jr., county treasurer of Shawnee County, do hereby certify that at a public sale of property for delinquent taxes, as provided by law, held at Topeka, the county seat of said county, on the first Tuesday, being the 3 day of September, A. D. 1878, the following described property, situated in the county of Shawnee, State of Kansas, was sold to A. J. Hentig, to wit: Beginning $37\frac{85}{100}$ chs. S. of NE. cor. of res. #2, K. H. B. L., W. 24 chs. and 50 links S. to Kansas River, E. to E. line of reserve, N. to place of beginning, 128 acres, for the sum of sixty-four and $\frac{97}{100}$ dollars, being the full amount of tax, penalty, and charges due upon said land for the year 1877, and unless redeemed in accordance with the provisions of law prior to that time the said A. J. Hentig
17 will be entitled to a deed thereof from the county the 4th day of September, A. D. 1881.

CHESTER THOMAS, JR.,
County Treasurer.

(Endorsed:) No. 993. Taxes of 1878, paid M'ch 10, 1879, $67\frac{83}{100}$. Chester Thomas, jr., county treasurer. Cert. county to A. J. Hentig.

STATE OF KANSAS,
Shawnee County, ss:

Filed and recorded Nov. 18, 1878, at 2.50 p. m. in book 55, page 456.
J. M. HARR, *Reg.*

Fees 75 c'ts, p'd. Res. 2.

B.

This lease, made 8th day of February, 1879, by A. J. Hentig, of the first part, to C. E. Gillan and W. K. Gillan, of the second part, witnesseth:

That the said party of the first part, in consideration of the rents, covenants, and agreements of the said parties of the second part, hereinafter set forth, does by these presents grant, lease, and rent to the said parties of the second part the following described property, situated in the county of Shawnee and State of Kansas, to wit, all that tract or parcel of land situate in the county of Shawnee & State of Kansas, and bounded and described as follows: Commencing at the northeast corner of reserve No. 2 of the Kansas half-breed Indian lands, thence running west twenty-four and one-half chains (24½), thence south to the Kansas River, thence east to the southeast corner of said reserve, thence north to the place of beginning, except, however, seventy-two acres off the north end thereof. This tract containing one hundred and twenty-eight (128) acres, more or less.

18 Said Gillans to have the privilege of cutting such timber as is necessary to repair the fences on said land any place south of the Silver Lake road, and for such firewood as is necessary for the use of the family while on said premises.

To have and to hold the same unto the said parties of the second part from the 1st day of March, 1879, to the 1st day of March, 1880.

And the said parties of the second part, in consideration of the leasing the premises as above set forth, covenants and agrees with the said party of the first part to pay the said party of the first part, her heirs or assigns, as rents for the same, the yearly rent or sum of two hundred ($200) dollars in two payments as follows, to wit, one hundred and fifty dollars on taking possession of said premises and fifty dollars on or before the 1st day of December, 1879; hereby waiving the benefit of exemption, valuation, and appraisement laws of said State of Kansas. To secure the payment thereof the said party of the second part further covenants with said party of the first part that at the expiration of the time mentioned in this lease, to give peaceable possession of the said premises to said party of the first part in as good a condition as they now are, the usual wear and inevitable accident and loss by fire excepted, and will not make or suffer any waste thereof, nor lease nor underlet, nor permit any other person or persons to occupy the same, or make or suffer to be made any alteration therein without the consent of said party of the first part in writing having been first obtained and not use or occupy said premises for any business or

19 thing deemed extra hazardous on account of fire; and that upon the non-payment of the rent, as aforesaid, the said party may, at his election, either distrain for said rent due or declare this lease at an end, and recover the same as if held by forcible detainer, the said parties of the second part hereby waiving any notice of such election or any demand for the possession of said premises. The covenants herein shall extend to and be binding upon the heirs, executors, and administrators of the parties to this lease.

In witness whereof the said parties have hereunto set their hands, and day and year first above written.

A. J. HENTIG,
By F. G. HENTIG, *Ag't.*
C. E. GILLAN.
W. K. GILLAN.

Lease from A. J. Hentig to C. E. Gillan and W. K. Gillan. Endorsed No. 2055. Mary A. Smith, adm'r'x, &c., vs. Daniel M. Adams et al. Substituted petition of A. J. Hentig. Filed July 18, 1879. A. S. Thomas, clerk.

20 And this day, to wit, July 18, 1879, there was filed in the clerk's office of said court, decision in said entitled suit, which said decision is in the words and figures following, to wit:

Decision.

U. S. C. C.

SMITH, ADM'R'X, }
vs.
ADAMS ET AL. }

The claim set up by A. J. Hentig does not bring her within the occupying claimant act. The only question is whether a tax certificate alone before expiration of time for redemption vests the title in the tax purchaser. I think it does not. (Williams v. Heath, 22 Iowa, 519; Brockett v. Gilmore, 15 Minn., 245.)

Gen'l stat. 1055, sec. 112, provides that the tax-deed shall vest title in grantee.

Motion denied.

C. G. FOSTER.

(Endorsed:) Smith, adm'r'x, vs. Adams, Hentig, et al. Decision on writ of assistance filed July 18, 1879. A. S. Thomas, clerk.

21 And on this day, to wit, Friday, July 18th, 1878, the clerk of said court made an entry on the order-book in said entitled suit which said entry is in the words and figures following, to wit:

Order-book entry.

MARY A. SMITH, ADM'R'X, &C., COMPL'T, }
vs. } 2055.
DANIEL M. ADAMS ET AL., DEF'TS. }

AT CHAMBERS, *July* 18, 1879.

Now comes the complainant and receiver, H. J. Page, by G. C. Clemens their solicitor, and A. J. Hentig, by Hentig & Sperry, her solicitors, and thereupon came on to be heard the matter of the petition of A. J. Hentig to enjoin the marshal from further proceeding in the execution of the writ of assistance issued herein to put said receiver into possession of the property described in the bill of complaint and decree herein, and to revoke said writ, and was argued by counsel; on consideration whereof it is now here ordered that said petition be and is overruled and denied.

From this order and ruling said A. J. Hentig prays an appeal to the Supreme Court of the United States, which is allowed, and the bond in appeal fixed at $300, to act as a supersedeas.

22 And on this day, to wit, Saturday, July 19, 1879, the clerk of said court made an entry on the order-book of said court in said entitled suit, which said entry is in the words and figures following, to wit:

Order-book entry.

In the circuit court of the United States for the district of Kansas.

In the matter of the writ of assistance.

A. J. HENTIG, COMPLAINANT,
vs.
H. J. PAGE, RECEIVER, &C., AND B. F. SIMPSON, U. S. marshal for the district of Kansas, defendants.

Leave is hereby given A. J. Hentig to file her bond & perfect her appeal in the above-entitled cause within ten days from this date & bond fixed, $300, to act as a supersedeas.

C. G. FOSTER, *Judge.*

(Endorsed:) Filed July 19, 1879. A. S. Thomas, clerk.

23 And on this day, to wit, July 22, 1879, there was filed in the clerk's office of said court bond on appeal of A. J. Hentig in said entitled suit, which said bond is in the words and figures following, to wit:

Bond on appeal of A. J. Hentig.

In the Supreme Court of the United States.

A. J. HENTIG, COMPLAINANT,
vs.
H. J. PAGE, RECEIVER, &C., AND B. F. SIMPSON, U. S. marshal for the district of Kansas, defendants.

Know all men by these presents that F. G. Hentig and J. K. Hudson, both of the city of Topeka, Shawnee County, Kansas, are held and firmly bound unto the above-named defendants, H. J. Page, receiver, &c., and B. F. Simpson, U. S. marshal for the district of Kansas, in the sum of three hundred dollars, to be paid to the said defendants, their heirs, executors, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, & administrators firmly by these presents, sealed with our seals & dated this 22nd day of July, 1879.

Whereas the above-named complainant, A. J. Hentig, has taken an appeal to the Supreme Court of the United States, to reverse the decree rendered in the above entitled action by the circuit court of the United States for the district of Kansas:

Now therefore the conditions of this obligation is such that, if the said named A. J. Hentig shall prosecute her said appeal to effect,
24 & answer all costs and damages if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and virtue.

F. G. HENTIG. [SEAL.]
J. K. HUDSON. [SEAL.]

Approved.

C. G. FOSTER, *Judge.*

(Endorsed:) No. 2055. Mary A. Smith, adm'x, &c., vs. Daniel M. Adams et al. Bond on appeal of A. J. Hentig. Filed July 22, 1879. A. S. Thomas, clerk, by J. N. Strickler, deputy.

25 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the record of the proceedings of said court, of the order appointing a receiver, report of receiver and entry in the order-book on the filing of said report, writ of assistance, and petition of A. J. Hentig to revoke said writ of assistance, and all subsequent proceedings relating thereto in said entitled suit of Mary A. Smith, adm'r'x, &c., vs. Daniel M. Adams et al., No. 2055 in said court.

In testimony thereof I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 19th day of August, A. D. 1879.

[SEAL.] A. S. THOMAS, *Clerk.*

26 *Citation.*

By the honorable C. G. Foster, one of the judges of the circuit court of the United States for the district of Kansas.

To H. J. Page, receiver, and B. F. Simpson, U. S. marshal, for the district of Kansas:

Whereas A. J. Hentig has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the district of Kansas, made in favor of you, the said H. J. Page, receiver, and B. F. Simpson, U. S. marshal, for the district of Kansas, and has filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court at the city of Washington, on the second Monday in October next, to do & receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Topeka, in the district of Kansas, in the 8th circuit, the 15th day of August, A. D. 1879.

C. G. FOSTER, *Judge.*

I hereby acknowledge service & enter my appearance in said cause for appellees.

G. C. CLEMENS,
Solicitor for Appellees.

(Indorsed:) No. 2055. Filed Aug. 18, 1879. A. S. Thomas, clerk.

27 *Appeal.*

In the Supreme Court of the United States.

MARY A. SMITH, ADM'X, &C.,
vs.
DANIEL M. ADAMS ET AL.

To the honorable judges of said court:

A. J. Hentig complains & says, that on the 8th day of July, 1879, she filed in the circuit court of the United States for the district of Kansas her bill in the above-entitled suit, praying that H. J. Page, the receiver

appointed by the court in the above-entitled cause, & B. F. Simpson, the marshal of said district of Kansas, be enjoined from executing a certain writ of assistance issued in said cause. The issues presented by said bill were heard on the 18th day of July, 1879, before Hon. C. G. Foster, one of the judges of said court, and the said judge entered judgment against the plaintiff, A. J. Hentig, for which she feels aggrieved & files herewith a copy of the record duly certified, & avers that there is error in the said record & proceedings, to wit:

The said judgment was given in favor of the said H. J. Page, receiver, & B. F. Simpson, marshal, when it should have been given for said A. J. Hentig, according to the law of the land.

The said A. J. Hentig, plaintiff, therefore prays that the said judgment may be reversed, & the said plaintiff restored to all things she has lost by reason thereof.

ALFRED ENNIS,
Solicitor for Appellant.

(Indorsement on cover:) No. 849. A. J. Hentig, appellant, vs. H. J. Page, receiver, &c., and B. F. Simpson, U. S. marshal for the district of Kansas. Kansas C. C. U. S. Filed 25th September, 1879.

OFFICE SUPREME COURT U. S.
FILED
SEP 3 1880
JAMES H. McKENNEY, Clerk.

IN THE SUPREME COURT

OF THE UNITED STATES.

No 849

A. J. HENTIG,
Appellant,
VS.
H. J. PAGE, *et al.*,
Appellee.

Brief of Appellant.

STATEMENT AND ARGUMENT OF APPELLANT.

C. A. SPERRY,
Attorney for Appellant.

Daily Capital Steam Printing House.

IN THE SUPREME COURT

OF THE UNITED STATES.

A. J. HENTIG,
Appellant,
VS.
H. J. PAGE, *et al.*,
Appellee.

Brief of Appellant.

STATEMENT OF THE CASE.

On the 26th day of October, 1877, Mary A. Smith, Administratrix *de bonis non* of the estate of Julius C. Wright, "deceased," filed her bill in the Circuit Court of the United States for the District of Kansas, against Daniel M. Adams and others, to foreclose a mortgage executed by Adams and wife on one hundred and twenty-eight acres of land in Shawnee county, Kansas, said mortgage secured the payment of a promissory note for $5,000, made by said Adams and dated October 3, 1872, with ten per cent interest from date until paid.

On the 3d day of September, 1878, this same one hundred and twenty-eight acre tract of land was sold by the Treasurer of Shawnee county, Kansas, as provided by law, for the taxes due thereon for the year 1877, and was purchased by this appellant, A. J. Hentig, who immedi-

ately took possession under her tax certificate of purchase, and had the same recorded, as required by law, in the office of the register of deeds for Shawnee county, Kansas. *See Exhibit "A" at p. 7 of printed record.* To this foreclosure suit APPELLANT WAS NOT A PARTY. *See Title of cause at p. 1 of printed record.*

On the 3d day of June, 1879, on motion of the complainant in the foreclosure suit one H. J. Page was appointed by the court receiver of the mortgaged premises, and on the 1st day of July, 1879, he demanded possession of said premises from the tenants of appellant and was refused. Whereupon he applied to the court for a writ of assistance, which was granted.

Said writ commanded the Marshal of said District "To immediately "upon the receipt of said writ to enter upon the said lands and tenements "and remove, eject and expel therefrom, and from every part thereof, all "persons in possession thereof, whether they be parties to this cause, or "tenants under any of said parties, or persons who have come into possession "of said premises or any part thereof pending this cause, and you are "further commanded as aforesaid to place and put said H. J. Page, "receiver as aforesaid, into the full, quiet and peaceable possession of said "premises in accordance with the said order of appointment," etc., etc. Upon the granting of the writ appellant filed her bill in equity in said court against said receiver, H. J. Page, and the Marshal of the United States for said District of Kansas, setting up her paramount title and the value of her property, and praying that they be enjoined from interfering with her said property and possession, and that the said writ be revoked, upon the ground that she was not a party to the foreclosure suit, and that the writ of assistance could not run against her or effect her possession or title. No answer or demurrer was filed by the defendants, and the case came up for hearing on the order to show cause upon the bill and exhibits, before the Hon. C. G. Foster, Judge of the District Court, sitting as the Circuit Court, and he decided that appellant HAD NO TITLE and dismissed the bill, and upon this decision the appellant comes to this court.

ARGUMENT.

A writ of assistance can only issue against parties to the proceedings and parties entering into possession under them after suit commenced.

Frelinghuysen vs. Cowden, 4th Paige, 204.

Van Hook vs. Throckmorton, 8th Paige, 33.

Reed vs. Marble, 10th Paige, 402.

Terrell *et al.* vs. Allison, 21st Wallace, 289.

This last case is directly in point. The Terrells were in possession under a purchase from the vendee of the mortgagor. They were not parties to the foreclosure suit, and a writ of assistance was applied for and allowed and afterwards revoked, and the question came up upon an order of the court for the Terrells to appear and show cause why the writ of assistance should not issue. The Terrells appeared and set up in their answer the sale and conveyance to them. That they were not parties to the suit and were not bound by the decree. The court decided these facts insufficient and dismissed the answer, and ordered an alias writ to issue, and from this order an appeal was taken and the decree reversed.

The question of TITLE cannot be determined in this summary way upon an order to show cause why a writ of assistance should not be revoked. The court decided in this case that a tax certificate alone before the expiration of the time for redemption did not vest title in appellant. *See decision on p. 9 of record.*

The appellant was in possession under her tax certificate of purchase, and she has a right to test her title in the proper tribunal. Possession under a tax sale carries with it many advantages, all of which she has a right to, and cannot be deprived of in this form of action. One of these rights is the repayment of all moneys paid out by her on the purchase and all subsequent taxes, with interest. *See Compiled Laws of Kansas*, 1879, *p.* 963, § 127. Another is payment for all improvements placed on the premises by the purchaser, called the Occupying Claimant's Act.

See Compiled Laws of Kansas, 1879, *p.* 684. To the benefit of this act the court say appellant is not entitled. *See decision on p. 9 of the record.*

In thus deciding we think the court erred. The Supreme Court of Kansas, in the case of Stebbins vs. Guthrie, 4 Kansas, p. 553, has decided a purchaser at a tax sale becomes the owner at the *time of the purchase*, and is entitled to the benefit of the Occupying Claimant's Act. The Supreme Court of Ohio have decided in the same way.

Lessees of Davis vs. Powell, 13th Ohio R., pp. 308–320.
Longworth vs. Wolfington, 6th Ohio R., p. 9.
Lessees of Shaler vs. Hagin, 2d Ohio R., p. 235.
19th Ohio R., p. 57.
11th Ohio R., p. 56.
11th Ohio State, p. 339.
De Treville vs. Smalls, 8th Otto, p. 517.

The court in its decision cites 22d Iowa, 519, and 15th Minn., 245. These cases can have no bearing upon the statutes of this State when said statutes have received a judicial construction by the Supreme Court of the same State.

The court in the case of Stebbins vs. Guthrie, 4th Kansas, 553, has decided that a purchaser at a tax sale becomes the owner at the time of the purchase, his title being only defensible by redemption in two years.

The decision of the highest court of a State upon the interpretation to be given the statutes of the State must be accepted in the federal courts as the proper construction thereof. See *in re* The Steamer J. H. Starin, U. S. C. Court, Dist. Connecticut, Sept. term, 1878, reported in the *Reporter*, No. 10, 1879; Adams vs. Nashville, 5th Otto, 19; Township of Elmwood vs. Marcy, 2d Otto, 289; State Railroad Tax Cases, 2nd Otto, 575.

C. A. SPERRY,
Attorney for Appellant.

SUPREME COURT U. S.
FILED
OCT. 25 1880
JAMES H. McKENNEY, CLERK

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1880.

A. J. HENTIG,
Appellant.
vs.
H. J. PAGE, *et al.*,
Appellees.

BRIEF OF APPELLEE.

C. M. FOSTER,
G. C. CLEMENS,
Counsel for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1880.

A. J. HENTIG,
Appellant,
vs.
H. J. PAGE, *et al.*,
Appellees.

BRIEF OF APPELLEE.

The record in this case discloses the following facts: On the fourth day of June, 1879, there was pending in the Circuit Court of the United States for the district of Kansas a certain suit in equity, wherein Mary A. Smith, adm'x *de bonis non* of the estate of Julius C. Wright, deceased, was complainant, and Daniel M. Adams and others were defendants. On that day said court made an order whereby the appellee, H. J. Page, was appointed receiver of the premises in controversy, with authority to take possession. Afterward, the receiver demanded possession of the premises which was refused. Thereupon the clerk of the court issued a writ of assista ce to put the receiver into possession. On the 12th of July, 1879, the

appellant filed her petition in the cause, asking that the writ might be set aside, whereupon the District Judge granted a rule on the complainant in the original suit to show cause why the writ of assistance should not be revoked. On the 18th day of July, 1879, a substituted petition was filed by the appellant, wherein she stated that she was the owner of the premises under a tax-sale certificate, and was in possession under it. On the hearing of said petition before the judge, at chambers, the rule was denied, and from that order an appeal was taken to this court.

Our statement differs from that of the appellant in this: We claim that there was no bill in equity filed by the appellant, and no final decree rendered.

Upon the filing of the record in this court, the appellees made a motion to dismiss the appeal on the ground that there had been no final decree, and a decision on that motion was postponed until the final hearing of the case on its merits.

ARGUMENT.

We believe this is the first appeal ever taken to this court from an order of a judge at chambers. If the case had been an original suit, and an injunction had been granted or refused by the court, there could have been no appeal to this court until the bill had been dismissed.

McCollum v. Eager, 2 How., 61.

In the case of Terrell et al. v. Allison, 21 Wall., 289, the appeal was taken from a final decree of the court; but no question was made as to the regularity of the proceedings.

If this is considered a final decree it must be affirmed;

as there is nothing but the simple petition in the record. There are no pleadings nor proofs in the case, and there is nothing for this court to pass upon. A bill, without any proof, will not support a decree.

The appellant in this case did not pursue her proper remedy. She should have presented her petition to be examined *pro interesse suo.*

Dan'l's Ch. Prac., 1057 and 1744.
Wiswal v. Sampson, 14 How., 65.

The Statutes of Kansas do not give to the holder of a tax-sale certificate the right of possession. They may give to the holder in possession the right to claim the value of his improvements before ejection. That is all that was before the court in the case of Stebbins v. Guthrie, 4 Kan., 553. It has never been decided by the Supreme Court of Kansas that the holder of a tax-sale certificate can maintain an action for the recovery of the possession of real estate. The case cited by the counsel for the appellant has no application to the question at issue.

But that Court has decided that a quit-claim deed will not pass the interest represented by a tax-sale certificate, so as to authorize the grantee to take a deed from the county. *Clippinger v. Fuller*, 10 Kan., 377. If the holder of such a certificate is the *owner*, this is a very strange decision!

On the other hand the cases of Williams v Heath, 22 Ia., 519, and Brockett v. Gilman, 15 Minn., 245, decide that the title to the land remains in the owner until the execution of the deed; and that the certificate holder has but a mere *lien*. If he has a mere lien, under whom does he hold it? Not against the county, because, as the county is also permitted to hold certificates, such a construction would make the county

hold a lien against itself. If the certificate is a lien, then that lien is derived through the owner of the land—through him who may redeem; and as the owner of the land was a party to the original litigation, and as the lien of the appellant was acquired, *pendente lite*, through the owner, Mrs. Hentig "must go."

This appeal should therefore be dismissed; or, if not, the order of the District Judge should be affirmed.

C. M. FOSTER,
G. C. CLEMENS,
Counsel for Appellee.